
GOVERNING ELECTIONS WITHOUT LAW

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The field of election law, unsurprisingly, focuses on law. But Professor Rick Hasen’s book *Election Meltdown*¹ rightly highlights that law can only take us so far in governing elections. As we think about the problems that persist in our elections, Professor Hasen moves us to think about long-term reforms, which are the best and perhaps only ways to respond to some of our elections’ short-term perils. Some of his proposed reforms offer new legal frameworks. But I want to focus on those nonlegal reforms that work alongside the law—places where the law simply runs out, where legislation is worse than the existing problem, or where superior longer-term solutions reside.

One concern may overwhelm the 2020 election (both up to and after Election Day) and likely will continue being a source of doubt in upcoming elections: How should we handle the spread of misinformation on social media?

We might be particularly concerned about foreign misinformation on social media platforms. It has been an open secret in the intelligence community that China seeks to undermine President Donald Trump’s reelection campaign, while Russia, as it did in 2016, seeks to harm the candidacy of Mr. Trump’s opponent—this time, former Vice President Joe Biden.²

There has been some progress in the matter of foreign *interference* in election systems. While foreign misinformation seeks to influence the public discourse and voter behavior, foreign interference in election systems attempts to alter or damage the elections infrastructure such as voter registration databases, voting machines, or ballot storage facilities.³ Friction arose after the 2016 election between the states and the federal government in responding to foreign interference. The Trump administration’s Department of Homeland Security (“DHS”) planned to continue a plan from the Obama administration designating elections systems as “critical infrastructure.” States were initially skeptical of

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¹ RICHARD L. HASEN, *ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THE THREAT TO AMERICAN DEMOCRACY* (2020).

² Miles Parks, *U.S. Intelligence: China Opposes Trump Reelection; Russia Works Against Biden*, NPR (Aug. 7, 2020, 3:39 PM), <https://www.npr.org/2020/08/07/900245813/u-s-intelligence-warns-china-opposes-trump-reelection-russia-works-against-biden> [<https://perma.cc/NJ8N-FB5Y>].

³ Press Release, Jeh Johnson, Sec’y, Dep’t of Homeland Sec., Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector (Jan. 6, 2017), <https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical> [<https://perma.cc/8GRZ-W4K9>].

federal oversight.⁴ Professor Hasen noted some early skepticism even within the Election Assistance Commission (“EAC”) about federal oversight, even as the EAC is tasked with distributing money to states to help them update and secure their election systems.

But coordination concerns or turf battles have largely dissipated ahead of the 2020 election. Relevant federal agencies are taking foreign interference seriously, through statecraft and spycraft. Congress has distributed some money to states to upgrade their election systems (although states inevitably and continually request more). States that once resisted federal help have now coordinated with DHS and EAC, often operating in information-sharing capacities rather than compulsory legal frameworks. The threat of Chinese, Russian, and other foreign interference remains in 2020, but vigilance and oversight has greatly improved from 2016.

When it comes to foreign *misinformation*, the challenge is much greater. In the context of regulating campaign finance of foreign nationals, then-Judge Brett Kavanaugh once wrote, “It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government.”⁵ Regulating foreign actors remains constitutionally and legally permissible but practically tricky. Foreign entities find straw donors and create shell companies to evade foreign spending limits, whether they are spreading misinformation or sincerely advocating for a particular candidate. Foreign influence and foreign misinformation are here to stay.

Professor Hasen rightly recognizes that “there is very little the government can do consistent with the First Amendment to stop” the spread of misinformation domestically.⁶ The government acting as a truth commission is not an appealing prospect. It is even worse when one considers self-interested politicians setting the rules for what their opponents may or may not say.

Justice Louis Brandeis argued in *Whitney v. California*,⁷ “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”⁸ Speech abounds, of course—the Internet has helped proliferate “cheap speech,” as Professor Hasen has written,⁹ borrowing a term from Professor

⁴ Derek T. Muller, *Three Divergent Election-Law Decisions in the Early Trump Administration*, 2017 ILL. L. REV. ONLINE (2017), <https://illinoislawreview.org/symposium/first-100-days/three-divergent-election-law-decisions-in-the-early-trump-administration/> [https://perma.cc/4LJ3-WVQ3].

⁵ *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (Kavanaugh, J.), *aff’d*, 565 U.S. 1104 (2012) (mem.).

⁶ HASEN, *supra* note 1, at 133.

⁷ 274 U.S. 357 (1927).

⁸ *Id.* at 377.

⁹ Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200, 200-02 (2018).

Eugene Volokh.¹⁰ But the constant flow of misinformation seems to be outpacing the market-driven fact-checking process that Justice Brandeis envisioned.

Misinformation spread over the Internet is hardly new, of course. It takes just a few moments online to find conspiracies about whether 9/11 was an inside job, the earth is flat, or President Barack Obama was secretly born in Kenya.

Private entities have sought to address misinformation on their platforms with decidedly mixed results. Furthermore, fact-checking among journalists can only go so far, particularly given curious decisions these “fact-checkers” have made over the years. The executive director of PolitiFact, for instance, has acknowledged that it can be subjective to choose what to fact-check and subjective in how to rate it.¹¹ Fact-checkers can take hyperbole and “fact-check” it, or they may admit that the fact is true but deem it false (in their judgment) because the fact lacks context. As Professor Hasen notes, fact-checking is hardly a silver bullet for the problem of misinformation.¹²

Social media companies have tried fact-checking ahead of the 2020 election. Consider Twitter’s “civic integrity policy,” which tries to separate what is a permissible and an impermissible use of its platform. As of May 2020, the policy prohibits “manipulating or interfering in elections or other civic processes,” including “posting or sharing content that may suppress participation or mislead people about when, where, or how to participate in a civic process.”¹³ In contrast, Twitter indicated it would not regulate content that includes “broad, non-specific statements about the integrity of elections or civic processes (such as unsubstantiated claims that an election is ‘rigged’).”¹⁴

Twitter implemented this policy by appending a warning to a tweet of Mr. Trump’s, which began, “There is NO WAY (ZERO!) that Mail-In Ballots will be anything less than substantially fraudulent. Mail boxes will be robbed, ballots will be forged & even illegally printed out & fraudulently signed.”¹⁵ This first example shows how much of a challenge it is to develop a consistent and coherent policy.

Was Mr. Trump misleading people about the security of voting by mail? Or was he providing broad, nonspecific statements about the integrity of the vote? Twitter made the judgment that it was misleading, and so it appended a note,

¹⁰ See Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).

¹¹ Elizabeth Culliford & Katie Paul, *With Fact-Checks, Twitter Takes on New Kind of Task*, REUTERS (May 30, 2020, 6:31 PM), <https://www.reuters.com/article/us-twitter-factcheck/with-fact-checks-twitter-takes-on-a-new-kind-of-task-idUSKBN2360U0>.

¹² Hasen, *supra* note 9, at 228-29.

¹³ *Civic Integrity Policy*, TWITTER, <https://help.twitter.com/en/rules-and-policies/election-integrity-policy> [<https://perma.cc/DXF6-CGKH>] (lasted updated May 2020).

¹⁴ *Id.*

¹⁵ Donald J. Trump (@realDonaldTrump), TWITTER (May 26, 2020, 8:17 AM), <https://twitter.com/realDonaldTrump/status/1265255835124539392>.

“Get the facts about mail-in ballots” with a link to some details.¹⁶ But Twitter’s own “fact-check” is internally inconsistent. In one place, Twitter reports, “[T]here is no evidence that mail-in ballots are linked to voter fraud.” In another, “Experts say mail-in ballots are very rarely linked to voter fraud.”¹⁷ (The second claim is the correct one.)

One could pick apart which tweets of Mr. Trump’s merit a response from Twitter and which do not, which tweets from other politicians are better or worse than the President’s tweets, and whether the policy is being administered consistently or effectively. Mr. Trump has increased his attacks on voting by mail. His opponents have increased their skepticism of the reliability of the U.S. Postal Service. Twitter has done little to correct anything. The policy appears to have had no deterrent effect, and it is unclear whether it has served any fact-advancing function.

And all to what end? Twitter, Facebook, Google, and other social media outlets are private companies but significant conduits of political speech. When fact-checking, these companies risk being perceived as picking winners and losers in a deluge of content. Alternatively, some Facebook employees, for instance, have publicly protested Facebook’s hands-off policy.¹⁸ Picking the right policy has not been an easy—or successful—answer for these outlets.

Maybe, as Professor Hasen notes, American voters must simply engage in the very long game of refocusing our civics education. That is assuredly an unsatisfying answer for those who want a statute or a social media policy to “fix” democracy. But a free people must be able to discern fact from fiction, truth from falsehood. A free people must exercise critical judgment and correct for cognitive biases. And a free people must be willing to engage in good faith with one another.

This last point is crucial to address one of Professor Hasen’s major concerns: incendiary rhetoric about “stolen” elections. There are robust legal processes to resolve election disputes. State and county election officials have ample recount tools at their disposal. Judicial or administrative review processes are available when outcomes are contested. And Congress has the final authority to review the elections and return of its members. In rare instances, a new election is held, like North Carolina’s 9th Congressional District after the 2018 election was tainted by ballot fraud.¹⁹

¹⁶ *Id.*

¹⁷ *Trump Makes Unsubstantiated Claim that Mail-In Ballots Will Lead to Voter Fraud*, TWITTER (May 26, 2020), <https://twitter.com/i/events/1265330601034256384>.

¹⁸ Sheera Frenkel, Mike Isaac, Cecilia Kang & Gabriel J.X. Dance, *Facebook Employees Stage Virtual Walkout*, N.Y. TIMES, June 2, 2020, at B1.

¹⁹ Miles Parks, *New Election Date Set in North Carolina’s 9th District Following Fraud Investigation*, NPR (Mar. 4, 2019, 2:38 PM), <https://www.npr.org/2019/03/04/699985857/new-election-schedule-set-in-north-carolinas-9th-district> [https://perma.cc/UB8P-33GP].

Professor Hasen expresses dismay at the uptick of the uncritical acceptance of the notion that a given election is “stolen.” He rightly notes a variety of contexts in which dirty tricks can and have taken place—a fake prohibitionist campaign on behalf of Roy Moore in the Alabama Senate election, Russian social media activity in 2016, and more. But he also importantly explains that we just do not know the effect that these dirty tricks had.

But that doesn’t stop politicians—like Bernie Sanders during the Democratic presidential primaries or Stacey Abrams in Georgia’s gubernatorial election—from sowing distrust in the outcomes of elections. It is much easier to cry “stolen” or “rigged” than to mount evidence for a legal or administrative challenge and bring a formal proceeding to contest the outcome. That is because, in all likelihood, the election was not really stolen or rigged.

There is precious little the law can do about incendiary rhetoric. Law cannot do everything, and we should not expect it to do everything. But the current trend of election destabilization sows public doubt about the legitimacy of the outcome. Every adjustment to a polling place becomes a cry of voter suppression; every mistake in a voter roll becomes a cry of voter fraud.

State and county election administrators are working frantically to provide absentee ballots to voters, safe polling locations for in-person voting, and swift and reliable counting of results in the 2020 election and beyond. Their tireless work too often goes unnoticed. One hopes that their efforts in a time of deep uncertainty will quell concerns from the public about the integrity of the election process. But in the end, it may simply take a generational shift toward building trust in these institutions. Professor Hasen’s book offers some concrete proposals to move us toward that end. That end can’t get here quickly enough.